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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. WILLIE LEE GAITHER, Defendant and Appellant.	B267029 (Los Angeles County Super. Ct. No. NA024192)

APPEAL from an order of the Superior Court of Los Angeles County, William Ryan, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director, Suzan E. Hier, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steve Mercer, Noah P. Hill, and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 1995, a jury convicted defendant and appellant Willie Lee Gaither of possession of a firearm by a felon. (Former Pen. Code, § 12021, subdivision (a)(1),[1] now § 29800, subd. (a)(1).) The trial court found true prior conviction allegations and sentenced defendant to 25 years to life in state prison pursuant to the Three Strikes law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

On November 28, 2012, following the passage of Proposition 36, the Three Strikes Reform Act of 2012, defendant filed a petition requesting recall of his sentence pursuant to section 1170.126. The trial court denied the petition, finding defendant was ineligible for relief because he was armed with a firearm during the commission of the offense within the meaning of sections 667, subdivision (c)(2)(C)(iii) and section 1170.126, subdivision (e)(2). Defendant appeals from the denial of his petition. We affirm.

BACKGROUND

In our prior opinion in this case we set forth the facts as follows:

"[T]he evidence established that defendant's address of record was 1509 Stanley Avenue, apartment number 101 in Long Beach on April 7, 1995. He lived there with Sandra Barnes. Defendant's parole agent, Colleen Grosso, visited defendant there about once a month. At approximately 8 p.m. that day, Grosso went with four police officers to conduct a parole search of the apartment. Barnes told Grosso that defendant was at the gym. Underneath a nightstand in the bedroom, Grosso found a loaded .380 semiautomatic pistol and a box of ammunition.

"Defendant was arrested in the apartment later that evening without incident. When questioned by police several days later, defendant stated that he had taken the gun and ammunition from Barnes's daughter, Shawnee, when she brought it home from school about a week prior to his arrest.

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[1] All statutory citations are to the Penal Code unless otherwise noted.

"In defense, 15-year-old Shawnee testified that she found the gun in the bushes in front of her school during an altercation between Black and Mexican students. According to Barnes, riots occurred at Shawnee's high school in the end of March. Some time later, in March or April of that year, Shawnee brought the gun to a neighbor, Kecia Johnson, and told Johnson how she had found it. Johnson advised her to give it to her mom or dad. Shawnee left Johnson with the gun still in her possession. Two days later, Shawnee told defendant about the gun. At defendant's direction, Shawnee put it under the nightstand. Trash was picked up on Saturday at the apartment and defendant told Shawnee to throw the gun down the trash chute on Saturday if he had to work that day. According to Shawnee, defendant never touched the gun. About one week later, defendant was arrested."

DISCUSSION

I. Standard of Review

We review de novo issues of statutory interpretation. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.)

II. Application of Relevant Principles

In November 2012, voters approved Proposition 36, the Three Strike Reform Act of 2012. (*People v. Superior Court* (2013) 215 Cal.App.4th 1279, 1285.) Under Proposition 36, a defendant who has two prior convictions for serious or violent felonies is subject to an indeterminate term of 25 years to life only if the defendant's third conviction is for a serious or violent felony. (*Id.* at pp. 1285-1286.) Proposition 36 also permits a defendant serving a sentence of 25 years to life for a third felony conviction that was not a serious or violent felony to seek court review of the defendant's indeterminate sentence and, under certain circumstances, to obtain resentencing if the defendant had only one prior conviction for a serious or violent felony. (*Id.* at p. 1286.)

An inmate is excluded from Proposition 36 resentencing if he was armed during the commission of the current offense. (§§ 1170.126, subd. (e)(2); 667, subd.

(e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).)[2] "'[A]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. [Citations.]" (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.) "The California Supreme Court has explained that '"[i]t is the availability—the ready access—of the weapon that constitutes arming."' (*People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391] (*Bland*), quoting *People v. Mendival* (1992) 2 Cal.App.4th 562, 574 [3 Cal.Rptr.2d 566].)" (*People v. White* (2014) 223 Cal.App.4th 512, 524.) Where "the record establishes that a defendant convicted under the pre-Proposition 36 version of the Three Strikes law as a third strike offender of possession of a firearm by a felon was armed with the firearm during the commission of that offense, the armed-with-a-firearm exclusion applies and the defendant is not entitled to resentencing relief under [Proposition 36]." (*Id.* at p. 519.) "[A] disqualifying factor contained in section 667, subdivision (e)(2)(C)(iii) or section 1170.12, subdivision (c)(2)(C)(iii) need not be pled and proved in the sense of being specifically alleged in an accusatory pleading and expressly either found by the trier of fact at trial of the current offense or admitted by the defendant." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058.) In determining whether an inmate is eligible for resentencing under Proposition 36, a trial court "is not limited to a consideration of the elements of the current offense and the evidence that was presented at the trial (or plea proceedings) at which the defendant was convicted. Rather, the court may examine relevant, reliable, admissible portions of the record of conviction . . . ." (*Id.* at p. 1063.)

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[2] Section 1170.126, subdivision (e)(2) provides an inmate is ineligible for resentencing under Proposition 36 if: "The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12."

In identical language, sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii) provide: "During the commission of the current offense, the defendant used a firearm, *was armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person." (Italics added.)

A. The Trial Court's Examination of the Record

Defendant contends that the trial court erred in denying his section 1170.126 petition when it found he was armed during the commission of his possession of a firearm by a felon offense because that finding was based on evidence beyond that necessary to establish the elements of the crime. That is, defendant argues, the trial court relied on facts not found by the jury.

At the hearing on defendant's petition to recall his sentence, the prosecutor relied on testimony given at defendant's trial by Long Beach Police Department Officer Steven Prell. Prell testified that he interviewed defendant in jail. Defendant told the officer that one week prior to defendant's arrest, Shawnee "came home and had a handgun and a box of ammunition with her. [Defendant] said that he took it from [Shawnee] and . . . placed the box and gun under a nightstand in the bedroom." Defense counsel relied on Shawnee's and Grosso's testimony. Shawnee testified that after she told defendant about the gun, he told her to put it under the nightstand and he never touched the gun. Grosso testified, "[A]fter I got through kind of looking around the nightstand—it was kind of heavy—I was going to look under it and it was heavy. And he moved it—referring to another officer that was at the scene—and tipped it back and that's when the handgun was found [and] the box of ammunition that was under that same nightstand." The trial court found that defendant was ineligible for Proposition 36 resentencing because he was armed with a firearm—i.e., he had a firearm readily available for offensive or defensive use. It stated that while Grosso may have testified that the nightstand was heavy, it was not immovable.

Defendant contends that eligibility for Proposition 36 resentencing depends only on those facts actually found by the jury—i.e., the facts that support the elements of the charged offense. The trial court erred in finding him ineligible, defendant argues, because the jury was not asked to resolve whether he had access to the gun and whether it was available for his use as arming was not an element of his possession of a firearm by a felon offense.

As stated above, the disqualifying exclusions in section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) do not have to be based on facts found by the jury. (*People v. Blakely, supra,* 225 Cal.App.4th at 1058.) A trial court may examine all "relevant, reliable, [and] admissible portions of the record of conviction" in determining whether a disqualifying exclusion exists. (*Id.* at pp. 1048, 1063.) Accordingly, the trial court was not strictly limited to a consideration of the evidence that established the elements of the offense. (*Ibid.*) Because the record reflects defendant had a firearm "available for use, either offensively or defensively," the trial court did not err in denying defendant's petition for recall of sentence. (*People v. Osuna, supra,* 225 Cal.App.4th at p. 1029; §§ 1170.126, subd. (e)(2); 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).)

B. "Arming" and the Possession of a Firearm by a Felon Offense

Defendant contends that the trial court erred in denying his petition for resentencing because his arming was a part of the offense of possession of a firearm by a felon. He argues that "when the drafters of Proposition 36 used the terms 'during the commission' and 'armed' in [sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii)],they must have intended that such 'arming' means having the weapon available for use in *furtherance of the commission of the offense* that is the subject of the recall petition. [Citation.] This in turn requires that the arming and the offense be separate, but 'tethered,' such that the availability of the weapon facilitates the commission of the offense."

We agree with the numerous cases that defendant acknowledges have rejected his argument. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 [Proposition 36's "[d]uring the commission of" provision created a required "temporal nexus between the arming and the underlying felony, not a facilitative one"]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799 [concluding the "defendant was armed with a firearm during the commission of his commitment offenses for possession of a firearm by a felon and possession of a short-barreled shotgun"]; *People v. Elder* (2014) 227 Cal.App.4th 1308,

1312-1314; *People v. Osuna, supra,* 225 Cal.App.4th at pp. 1030-1032; *People v. Blakely, supra,* 225 Cal.App.4th at p. 1048; *People v. White, supra,* 223 Cal.App.4th at p. 519.)

C. Standard of Proof

Defendant contends that the trial court improperly used a preponderance of the evidence standard of proof rather than a beyond a reasonable doubt standard in deciding whether he was armed. There is a split of authority concerning the proper standard of proof. (*People v. Arevalo* (2016) 244 Cal.App.4th 836, 852 ["the appropriate standard of proof is beyond a reasonable doubt"]; *People v. Osuna, supra,* 225 Cal.App.4th at p. 1040 ["a trial court need only find the existence of a disqualifying factor by a preponderance of the evidence"].) As we would affirm the trial court's arming determination under either standard, we need not decide which standard prevails.

As set forth above, defendant told Prell that Shawnee brought home the handgun and a box of ammunition one week prior to defendant's arrest. He told Prell that he took the handgun from Shawnee and placed it under the nightstand in the bedroom. Defendant made his statement while in jail with no conceivable reason to inculpate himself. Based on this evidence, a reasonable trier of fact would have found that defendant was armed under either the preponderance (*People v. Arevalo, supra,* 244 Cal.App.4th at p. 852) or the beyond a reasonable doubt standard of proof (*People v. Osuna, supra,* 225 Cal.App.4th at p. 1040).

Defendant contends that his statement to Prell is insufficient to support the arming finding beyond a reasonable doubt because Shawnee subsequently provided exculpating testimony that she put the handgun under the nightstand. He argues that his "purported statement to the officers was not entirely inconsistent with this, as the supposed statement that he took the gun from her could have been based upon his figuratively doing so by having her put it under the nightstand . . . ." We are not persuaded that defendant's proffered interpretation of defendant's statement to Prell is sufficiently plausible that the

trial court erred in rejecting it in favor of the inculpatory interpretation of defendant's statement.

DISPOSITION

The order is affirmed.

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RAPHAEL, J.*

We concur:

TURNER, P. J.

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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BAKER, J., Dissenting

In the years following enactment of Proposition 36, the Three Strikes Reform Act of 2012, several Court of Appeal decisions confronted what was then a novel question: can a person whose "current offense"[1] is a felon in possession of a firearm conviction obtain Proposition 36 relief notwithstanding a provision in the new law that bars relief for anyone who was armed with a firearm "[d]uring the commission of the current offense." (Pen. Code,[2] §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) One of the first such decisions was *People v. White* (2014) 223 Cal.App.4th 512 (*White*), and several others followed. (See, e.g., *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*); *People v. Blakely* (2014) 225 Cal.App.4th 1042 (*Blakely*); *People v. Elder* (2014) 227 Cal.App.4th 1308 (*Elder*).)

The answer given in each of these opinions was essentially, "it depends." That is, the cases rejected both the view that a felon in possession of a firearm conviction was automatically disqualifying, and the view that a felon in possession conviction can never bar relief because the armed-with-a-firearm proviso in Penal Code sections 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) requires the arming to be tethered to a separate criminal offense "which does not include possession." (*White*, *supra*, 223 Cal.App.4th at pp. 518, 524-525; *Blakely*, *supra,* 225 Cal.App.4th at p. 1048; see also *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284.) Instead, these cases reasoned that the issue reduced to the question of whether the gun was "readily accessible to [the defendant] at the time of its discovery." (See, e.g., *Elder*, *supra*, 227

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1 The "current offense" is the offense that triggers imposition of an indeterminate sentence under the Three Strikes law. (See Pen. Code, §§ 667, subd. (e), 1170.12, subd. (c).)

2 Statutory references that follow are to the Penal Code.

Cal.App.4th at pp. 1313-1314; *White, supra*, at p. 524 ["[T]he record of conviction establishes that White's life sentence was imposed because he was in physical possession of a firearm when the police officers approached him, and, thus, he was armed with a firearm during the commission of his current offense"].)

In so reasoning, these earlier decisions emphasized the difference between the concepts of possession and arming. They explained possession of a weapon can be actual (when the weapon is in a defendant's immediate possession) or constructive (when not in a defendant's immediate possession but under his or her dominion or control), and they explained either type of possession suffices for a felon in possession of a firearm conviction. (See, e.g., *Osuna*, *supra*, 225 Cal.App.4th at pp. 1029-1030.) "'Armed with a firearm,'" on the other hand, "has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively." (*Blakely*, *supra*, 225 Cal.App.4th at p. 1051.) The cases accordingly concluded not all felons in possession of a firearm would necessarily be "armed" with the firearm, and by employing this rationale, the cases avoided what would otherwise be a forceful defense argument, namely, that the drafters of Proposition 36 (and the voters who passed it) cannot have intended the armed-with-a-firearm proviso to always prohibit relief to a felon in possession of a firearm defendant because if they had, they would have simply included the felon in possession of a firearm statute (now, section 29800; formerly, section 12021) among the crimes enumerated as categorically ineligible for Proposition 36 relief. (*Blakely*, *supra*, 225 Cal.App.4th at p. 1055 ["Voters easily could have expressly disqualified any defendant who committed a gun-related felony or who possessed a firearm, had they wanted to do so. This is not what voters did, however"]; see also §§ 667, subds. (e)(2)(C)(i)-(ii), (e)(2)(C)(iv), 1170.12, subds. (c)(2)(C)(i)-(ii), (c)(2)(C)(iv), 1120.126, subd. (e).)

Blakely and *Osuna*, in particular, illustrated the point (that "[a] firearm can be under a person's dominion and control without it being available for use") with the following example: "[S]uppose a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm,

because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm; hence, the trial court correctly determined defendant was not automatically ineligible for resentencing by virtue of his conviction for violating section 12021." (*Blakely*, *supra*, 225 Cal.App.4th at p. 1052; accord, *Osuna*, *supra*, 225 Cal.App.4th at p. 1030; see also *Elder*, *supra*, 227 Cal.App.4th at pp. 1313-1314.)

The factual scenario described in *Osuna* and *Blakely* to illustrate circumstances in which a defendant would *not* be "armed" is precisely the factual scenario at issue in this case where the majority holds defendant *is* armed, and thus ineligible for Proposition 36 relief. As I read the majority opinion, it reaches this result by stretching the "[d]uring the commssion of the current offense" component of the armed-with-a-firearm proviso. That is, the majority implicitly concedes defendant was not "armed" on the date defendant's parole agent found the firearm underneath a nightstand when he was not present, but relies on defendant's post-arrest statement admitting he took the firearm from his daughter when she brought it home about a week prior to his arrest—and thus had it available for offensive or defensive use at an earlier time.

This expansion of the meaning of "during the commission of the current offense," which has no discernable conceptual limit, would render ineligible for Proposition 36 relief any felon in possession defendant so long as substantial evidence permits a factfinder to conclude he or she was in sufficiently close proximity to a firearm at any time in the past, regardless of when or in what circumstances the possession of that firearm is ultimately discovered. To my knowledge, such a conclusion goes further than any appellate decision to date. (But see *People v. Hicks*, *supra*, 231 Cal.App.4th at pp. 280, 284 [defendant armed when apprehended at gate of apartment complex even though gun found in a backpack inside one of the apartments].) Indeed, if today's decision were the controlling rule, the circumstances under which a felon in possession defendant might be eligible for Proposition 36 relief are so de minimis as to call into question the foundation for the reasoning in *White*, *Osuna*, *Blakely*, and *Elder*—all opinions on which

the majority relies. (See, e.g., *White*, *supra*, 223 Cal.App.4th at p. 524 ["[P]ossession of a firearm does not necessarily require that the possessor be armed with it. For example, a convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm and, thus, was not armed with it"]; *Osuna*, *supra*, 225 Cal.App.4th at p. 1030; *Blakely*, *supra*, 225 Cal.App.4th at p. 1057 ["[A] firearm passed down through family members and currently kept in a safe deposit box by a convicted felon would be under his or her dominion and control, but would present little or no real danger"]; *Elder*, *supra*, 227 Cal.App.4th at pp. 1313-1314 [finding no conflict with voter intent "even if the great majority of commitments for unlawful gun possession come within our interpretation of this eligibility criterion," but only because "not *every* commitment offense . . . *necessarily* involves being armed with the gun[ ] if the gun is not otherwise available for use . . . e.g., where it is under a defendant's dominion and control in a location not readily accessible to him *at the time of its discovery*], third italics added.)

I would not break new ground. I would hold the eligibility line where it now stands under *White*, *Osuna*, *Blakely*, and *Elder*, lest California judges accomplish what the voters enacting Proposition 36 did not: barring, for all intents and purposes, any defendant convicted of a felon in possession of a firearm triggering offense from obtaining relief under Proposition 36.

I respectfully dissent from the majority's holding that defendant was armed with a firearm during the commission of the current offense.

BAKER, J.